

HOGAN & HARTSON
L.L.P.

DOCKET FILE COPY ORIGINAL
CC: 96-45

MICHELE C. FARQUHAR
PARTNER
DIRECT DIAL (202) 637-5663
INTERNET MF7@DC2.HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

July 20, 1998

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

RECEIVED

JUL 23 1998

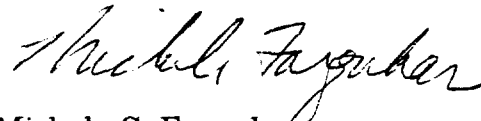
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Petition for Preemption Pursuant to Section 253 of the
Communications Act of Kansas Statutes and Rules that
Discriminate Against New Entrants**

Dear Ms. Salas:

On behalf of Western Wireless Corporation, enclosed please find an original and four (4) copies of a Petition for Preemption Pursuant to Section 253 of the Communications Act of Kansas Statutes and Rules that Discriminate New Entrants. If there are any questions regarding this matter, please contact the undersigned directly.

Sincerely,



Michele C. Farquhar
Counsel for Western Wireless Corporation

cc: Western Wireless Corporation
Service List

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter Of)
)
WESTERN WIRELESS CORPORATION)
)
Petition for Preemption, Pursuant to)
Section 253 of the Communications Act, of)
Kansas Statutes and Rules that)
Discriminate Against New Entrants)

PETITION FOR PREEMPTION

WESTERN WIRELESS CORPORATION

Gene DeJordy
Executive Director of
Regulatory Affairs
WESTERN WIRELESS
CORPORATION
3650 - 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5600

Mark P. Johnson
Lisa C. Creighton
Amy E. Bauman
SONNENSCHNEIN, NATH & ROSENTHAL
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
(816) 932-4400

Counsel for Western Wireless Corporation

Dated: July 20, 1998

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. BACKGROUND	3
II. ARGUMENT	7
A. The Legal Standard For Preemption In The Universal Service Context Is Well-Established.	7
B. The Kansas Fund Is Not Competitively Neutral Because Only Incumbent Local Exchange Carriers Are Eligible To Receive Statewide Support.	8
C. The Kansas Fund Violates Sections 253 And 254 Because It Is Designed To Ensure Revenue Neutrality For Incumbent Local Exchange Carriers, Not To Preserve Universal Service.	12
III. CONCLUSION	18

In The Matter Of)
)
WESTERN WIRELESS CORPORATION)
)
Petition for Preemption, Pursuant to)
Section 253 of the Communications Act, of)
Kansas Statutes and Rules that)
Discriminate Against New Entrants)

Western Wireless Corporation (“Western Wireless”) respectfully petitions the Federal Communications Commission (“Commission”) to preempt Kansas statutes and rules that unlawfully established a purported universal service program that is not competitively neutral and is not related to the cost of providing universal service. Because these provisions discriminate against new entrants and have the effect of deterring competitive entry, they violate Section 253 of the Communications Act of 1934, as amended (“Act”), and must be preempted by the Commission. 1/

In adopting the Telecommunications Act of 1996 (“1996 Act”), the Congress authorized states to set up their own intrastate universal service

1/ 47 U.S.C. § 253. Western Wireless provides cellular service in Western Kansas under the Cellular One brand name, and holds broadband personal communications service licenses in several basic trading areas (BTAs) in Kansas.

programs, as long as such programs are "not inconsistent with the Commission's rules[.]" 2/ Congress protected the states' ability "to impose, on a *competitively neutral basis* and *consistent with section 254*, requirements necessary to preserve and advance universal service," 3/ but it preempted state statutes and regulations that have the effect of precluding competitive entry, including so-called universal service requirements that are neither competitively neutral nor consistent with Section 254. 4/ Moreover, Congress explicitly directed, using mandatory language, that "the Commission *shall preempt*" any such state requirements to the extent necessary. 5/

The Kansas legislature and the Kansas Corporation Commission ("KCC") have stepped across the line carefully drawn by Congress. Their so-called Kansas Universal Service Fund ("Fund," "Kansas Fund," or "KUSF") program is neither competitively neutral nor consistent with Section 254. First, the Fund is not competitively neutral because only incumbent local exchange carriers ("incumbent LECs") are eligible to obtain support from the Fund *in the entire state*; competitive carriers are eligible for support in only selected areas of the state.

2/ 47 U.S.C. § 254(f).

3/ 47 U.S.C. § 253(b).

4/ 47 U.S.C. § 253(a).

5/ 47 U.S.C. § 253(d). Congress's mandatory directive that *the Commission*, in particular, exercise preemption powers, *id.*, squarely establishes the Commission's jurisdiction to consider these issues *de novo*, and makes it irrelevant that state and federal courts have considered related issues. *See infra* at 13-14.

Second, the Fund is inconsistent with Section 254 because it is designed to ensure revenue neutrality for incumbent LECs in the context of intrastate access charge reform, and has no relationship to preserving universal service for high-cost areas in the state or to the costs of providing universal service. These points are discussed in more detail below.

Because the Kansas Fund has the effect of restricting entry and is not a competitively neutral universal service program consistent with Section 254, the Commission *must* preempt the program pursuant to Section 253(d) of the Act. (It should be noted that in this Petition, we do *not* argue for wireless-specific preemption based on Section 332.)

I. BACKGROUND

On April 4, 1996, the KCC established the Kansas Universal Service Fund to administer the collection and distribution of universal service support payments. The purported purpose of the Fund is to ensure the universal availability of telecommunications service in Kansas. Shortly thereafter, the Kansas legislature enacted the Kansas Telecommunications Act (the "Kansas Act"), which became effective on July 1, 1996. ^{6/} The Kansas Act includes detailed directions regarding local competition, intrastate access charge reform, rate

^{6/} Kansas Telecommunications Act, Kan. Stat. Ann. §§ 66-2001 *et seq.* ("Kansas Act"), especially §§ 66-2004, 66-2005, 66-2008, and 66-2009. These provisions are included in Exhibit A to this petition.

rebalancing, and the Kansas Universal Service Fund, as well as a separate program to support low income consumers (the "Kansas Lifeline Service Program").

In particular, the Kansas Act directs incumbent LECs to reduce their intrastate access charges to interstate levels over a three-year transition period. 7/ The statute also requires that the KCC take steps (either increasing other rates or providing support from the Fund) to ensure that incumbent LECs remain revenue neutral as a result of this change, 8/ and requires all carriers, including wireless carriers, to make contributions to support the Fund. 9/ The Kansas Act also provides that the Fund disburse support in a competitively neutral manner to all telecommunications providers, but guarantees funding only to incumbent LECs, through the revenue neutrality requirement. 10/

The KCC promptly conducted proceedings to implement the Kansas Act, including its universal service provisions, and issued a final order on December 27, 1996 ("*KCC Order*"). 11/ The KCC ordered that all telecommunications service providers contribute an equal percentage of their

7/ Kan. Stat. Ann. 66-2005(c).

8/ *Id.*

9/ Kan. Stat. Ann. 66-2008(b).

10/ Kan. Stat. Ann. §§ 66-2008(c) and 66-2009.

11/ *General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas*, Docket No. 190,492-U, 94-GIMT-478-GIT, 1996 WL 938814 (KCC, Dec. 27, 1996) ("*KCC Order*") (included as Exhibit B).; *aff'd in pertinent part on recon.* (KCC, Feb. 3, 1997) ("*KCC Recon. Order*") (included as Exhibit C). See notes 15-16 *infra* for subsequent history.

intrastate retail revenues to the Fund; the percentage would reach 14.1 percent in the third year of operations. ^{12/} The KCC further ordered that the Fund initially be sized at \$111.6 million, an amount equal to the total incumbent LEC revenues lost from reduced intrastate access charges. ^{13/} Although noting that it could have ordered the incumbent LECs to rebalance their local rates to offset any of the revenues lost due to access charge reductions, the KCC chose not to do so. Finally, the *KCC Order* provides that incumbent LECs will be eligible for funding with respect to their operations statewide, but that alternative LECs (*i.e.*, competitive LECs; it is unclear whether this term includes commercial mobile radio service ["CMRS"] providers or not) will be eligible for funding *only* for their service in exchanges with 10,000 or fewer access lines. ^{14/}

On appeal, the Kansas Court of Appeals on August 8, 1997 struck down certain aspects of the Kansas Act and the *KCC Order* on the grounds that the State Act's mandate that the fund be "revenue neutral" for incumbent LECs violated Section 254 of the federal Act. ^{15/} The Kansas Supreme Court, on March

^{12/} *KCC Order*, ¶¶ 109, 187. From March 1, 1997 until March 1, 1998, the Fund assessment was 9.89% of retail revenue. The assessment for March 1, 1998 until March 1, 1999 is 7.33% of retail revenue. Due to higher than expected revenues during the first year, the Commission recently also reduced the size of the KUSF to \$100 million and accelerated the three-year rebalancing effort to two years.

^{13/} *Id.*, ¶ 112.

^{14/} *KCC Order*, ¶¶ 112, 123.

^{15/} *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of Kansas*, 943 P.2d 494 (Kan. Ct. App. 1997) ("*Kansas Appeals Court Decision*") (attached as Exhibit D); see following footnote for subsequent history.

13, 1998, reversed the Court of Appeals decision, upheld the validity of the State Act, and affirmed the KCC Order in all respects. 16/ We discuss these cases at length below. 17/ Related litigation is pending in the U.S. District Court for the District of Kansas. 18/

On April 23, 1998, the Kansas legislature enacted a bill amending certain provisions of the State Act. The State Act now limits the amount that carriers (including wireless carriers) may collect from their customers to 8.89% of their intrastate retail revenues. 19/ The State Act also reduces the Fund assessment for wireless providers by the percentage that their traffic consists of minutes of usage initiated and terminated entirely over the wireless network. 20/ Both provisions expire January 1, 2000.

16/ *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of Kansas*, 956 P.2d 685 (Kan. 1998) ("*Kansas Supreme Court Decision*") (attached as Exhibit E).

17/ *See infra* at 13-14.

18/ A number of wireless carriers have filed a lawsuit arguing, *inter alia*, that the Kansas Act and the KCC's orders violate Section 332(c)(3)(A) by requiring commercial mobile radio service ("CMRS") providers to pay into the Fund and that the Fund unlawfully discriminates against CMRS providers. The district court denied a request for a preliminary injunction based upon the Section 332(c)(3)(A) argument, which the Tenth Circuit recently affirmed. *Sprint Spectrum, L.P. v. State Corp. Comm'n of Kansas*, Nos. 97-3180 & 97-3186 (10th Cir. Jun. 23, 1998). Western Wireless is not raising this legal issue in this petition.

19/ Kan. Stat. Ann. § 66-2008(b). Significantly, however, this provision does not change the amount that the carriers must pay into the Fund. It is far from clear how this provision, as applied to CMRS providers, can be reconciled with Section 332(c)(3)(A) of the Act.

20/ *Id.*

II. ARGUMENT

A. The Legal Standard For Preemption In The Universal Service Context Is Well-Established.

Sections 253(a) and (b) provide a clear legal standard regarding Commission preemption of a state statute or regulation, and the Commission has applied this standard on a number of occasions. 21/ First, under Section 253(a), the Commission examines whether the state provision "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 22/ The prohibition need not be total; the Commission has held that a statute or regulation that "significantly affects, if not completely eliminates," the ability of telecommunications service providers other than incumbent LECs to enter a market, will violate Section 253(a). 23/

Second, a state universal service program may escape preemption only if it meets the criteria established in Section 253(b). Specifically, Section 253(b) preserves states' ability "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal

21/ 47 U.S.C. §§ 253(a) & (b). See, e.g., *Classic Telephone, Inc.*, 11 FCC Rcd 13082 (1996); *New England Public Communications Council*, 11 FCC Rcd 19713 (1996), *recon. denied*, 12 FCC Rcd 5215 (1997); *Pittencrieff Communications, Inc.*, File No. WTB/POL 96-2, FCC 97-343, 9 CR (P&F) 1041 (released Oct. 2, 1997); *Silver Star Tel. Co.*, 12 FCC Rcd 15639 (1997); *Public Utility Commission of Texas*, CCBPol 96-13 *et al.*, FCC 97-346, 9 CR (P&F) 958 (released Oct. 1, 1997); *California Payphone Association*, 12 FCC Rcd 14191 (1997).

22/ 47 U.S.C. § 253(a).

23/ *New England Public Communications Council*, 11 FCC Rcd at 19722, ¶ 20.

service. . . ." 24/ The Commission has held that a state program must meet *all* three of these criteria -- it must be "competitively neutral," "consistent with section 254," and "necessary to preserve and advance universal service" to fall within the "safe harbor" of Section 253(b). 25/ The failure of even one of the three criteria means that the offending statute or regulation must be preempted. 26/ As shown below, the Kansas Fund fails to satisfy these criteria in several respects, and must be preempted.

B. The Kansas Fund Is Not Competitively Neutral Because Only Incumbent Local Exchange Carriers Are Eligible To Receive Statewide Support.

The Kansas Fund disburses revenues *only* to incumbent LECs in almost all circumstances. It therefore constitutes, in effect, a barrier to entry, in violation of Section 253(a). 27/ And because it is not "competitively neutral" or "necessary to preserve and advance universal service," the restriction of qualifying carriers to incumbent LECs in most cases cannot be reconciled with Section 253(b). 28/

24/ 47 U.S.C. § 253(b).

25/ *Pittencrieff Communications, Inc.*, 9 CR (P&F) at 1051, ¶ 33; *accord Silver Star Tel. Co.*, 12 FCC Rcd at 15655-57, ¶¶ 37, 40.

26/ For example, in *Silver Star*, the Commission preempted a Wyoming statute solely for its failure to satisfy the first, "competitive neutrality," criterion, and determined that inquiry into remaining criteria would be superfluous. 12 FCC Rcd at 15658-60, ¶¶ 42, 45.

27/ 47 U.S.C. § 253(a).

28/ 47 U.S.C. § 253(b).

On its face, the Kansas Act contemplates that "distributions from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers, and wireless telecommunications service providers. . . ." 29/ But in implementing this statute, the KCC decided that the only "universal service area in which an ALEC may qualify for KUSF support is an exchange area with 10,000 or fewer access lines." 30/ Thus, while the Fund disburses support to incumbent LECs statewide, other carriers' eligibility for support is limited to the smallest and most remote rural areas. For example, if Southwestern Bell were held to the same eligibility requirements as competitive entrants, it would receive less than \$9 million from the Fund, as opposed to the \$73 million it will receive under the *KCC Order*. 31/ Moreover, as noted above, it is unclear whether the term "ALEC" ("alternative LEC") includes commercial mobile radio service ("CMRS") providers or not. If it

29/ Kan. Stat. Ann. § 66-2008(c). The Kansas legislature and the KCC use the term "telecommunications public utilities" to refer to incumbent local exchange carriers. Confusingly, they use the term "telecommunications carriers" to refer to state-regulated carriers *other than* incumbent local exchange carriers, including interexchange carriers ("IXCs") and competitive local exchange carriers ("CLECs"), and they use the abbreviation "ILEC" to refer to *independent* local exchange carriers, *i.e.*, incumbents smaller than Southwestern Bell, GTE, and Sprint/United. A glossary comparing KCC and FCC terminology is included in Exhibit F.

30/ *KCC Order*, ¶ 123(b). The term "ALEC" is an abbreviation for "alternative LEC."

31/ See Direct Testimony of Gerald A. Lammers, Utility Division, KCC, at 36-37 & Exh. 3 (July 3, 1996) (attached hereto as Exhibit G).

does not, then the *KCC Order* directly excludes CMRS carriers from a program for which all other carriers are eligible.

This restriction has the effect of creating a substantial barrier to the entry of carriers other than incumbent LECs in almost all of Kansas. It effectively prohibits all entities other than incumbent LECs from becoming universal service providers in most of Kansas. New entrants cannot hope to compete on a level playing field with an incumbent LEC if their competitor is receiving substantial explicit subsidy payments for which the new entrant is ineligible. (In addition, the Kansas system does not eliminate *implicit* subsidy support to incumbent LECs.) This confers a major competitive advantage on the ILECs and creates a significant disincentive for all other carriers to provide universal service in Kansas.

The KCC's regulations limiting Fund disbursements to incumbent LECs in almost all parts of Kansas violate Section 253(a) because they "have the effect of prohibiting the ability of any entity [other than incumbent LECs] to provide any interstate or intrastate telecommunications service." ^{32/} Moreover, the KCC's restrictions on Fund disbursements do not fall within the Section 253(b) safe harbor because they are not "competitively neutral," are not "consistent with section 254," and are not "necessary to preserve and advance universal service."

First, they are not competitively neutral because they provide funding to incumbent LECs but deny it to all other carriers in most parts of the state, particularly the larger municipalities, where exchanges have more than 10,000

^{32/} 47 U.S.C. § 253(a).

access lines. ^{33/} Second, the program is not consistent with Section 254, as discussed below in Section II-C. And third, neither the Kansas legislature nor the KCC has made any showing that limiting funding to incumbent LECs in most parts of the state is necessary to preserve or advance universal service.

The Commission has recognized that “a state’s refusal to designate an additional eligible carrier on grounds other than the criteria in section 214(e)” for *state* universal service funding purposes may *not* be “consistent with federal statutory requirements” such as Section 253(b). ^{34/} In particular, the Commission found, in the context of the federal universal service fund, that “any wholesale exclusion of a class of carriers . . . would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act. The treatment granted to certain wireless carriers . . . does not allow states to deny wireless carriers eligible status.” ^{35/} The same rationale clearly applies to state programs such as the Kansas Fund. The Commission must preempt this aspect of the Kansas program.

^{33/} Unlike the Texas regulations at issue in *Pittencrieff*, the Kansas regime “single[s] out” one class of providers, and does not “treat[] [each class of providers] the same as other telecommunications carriers.” 9 CR (P&F) at 1050, ¶ 35.

^{34/} *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8852, ¶ 136 & n.328 (1997) (“*Universal Service Order*”).

^{35/} *Id.*, 12 FCC Rcd at 8858, ¶ 145.

C. The Kansas Fund Violates Sections 253 And 254 Because It Is Designed To Ensure Revenue Neutrality For Incumbent Local Exchange Carriers, Not To Preserve Universal Service.

The Kansas Fund is explicitly designed to guarantee revenue neutrality to incumbent LECs in the context of intrastate access charge reform. ^{36/} The net result is that the program forces CMRS carriers and other new entrants to subsidize their chief competitors, the incumbent LECs. As a cross-subsidy from new entrants to incumbent LECs, the Fund constitutes a barrier to entry under Section 253(a), and violates Section 253(b) and the universal service provisions of Section 254.

The Kansas Act requires incumbent LECs to reduce their intrastate access charges to the level of interstate access charges over a three-year transition period. The Kansas Act also specifies that the KCC must implement this access charge reduction in a manner that assures revenue neutrality for the incumbent LECs. ^{37/} The KCC could have implemented this provision by rebalancing the incumbent LECs' rate structures, but it declined to do so. Instead, it decided to fund the access rate reduction out of the so-called Kansas Universal Service Fund. ^{38/} Unlike the federal universal service fund and most other states' post-1996 Act approaches to universal service support, the Kansas Fund is *not* targeted

^{36/} Kan. Stat. Ann. § 66-2005(c).

^{37/} Kan. Stat. Ann. § 66-2006(a).

^{38/} KCC Order, ¶¶ 111-12.

to support the difference between the cost of universal service in high-cost areas and a target rate level.

The Kansas Court of Appeals, in reversing this aspect of the Kansas Act and *KCC Order* as contrary to Section 254, explained the problem eloquently:

The revenue neutral concept is foreign to the Federal Act and was obviously intended by the Kansas Legislature to protect revenues by incumbent LECs facing a \$111.6 million loss of earnings as a result of reductions in long distance [access] rates and toll charges. . . . This legislation is inconsistent with the provisions of the Federal Act, specifically §§ 254(b)(4), (b)(5), (f), and (i), and prevented the KCC from performing its regulatory responsibilities in general and insuring compliance by carriers with § 254(k) of the Federal Act. . . . [T]he KCC order has created a \$111.6 million fund that bears no rational relation to the concept of universal service. ^{39/}

While these conclusions were reversed by the Kansas Supreme Court, that court did not engage in any analysis of the relationship between the revenue neutrality goal of the Kansas Fund and the requirements of the federal statute. ^{40/} More fundamentally, the Kansas Supreme Court decision has no *res judicata* relevance to this proceeding, because the Commission is not only permitted, but is

^{39/} *Kansas Appeals Court Decision*, 943 P.2d at 506-07.

^{40/} *Kansas Supreme Court Decision*, 956 P.2d at 699-700. Rather, the court's analysis was primarily focused on the program's consistency with *Kansas* law, *id.* at 700-01, and the court observed that "the ultimate issues in this case will, for the most part, be determined by the federal courts under federal law, which will render most of this opinion as a suggestion to the federal courts for such consideration as they choose to give it, if any." *Id.* at 691. The Kansas Supreme Court also apparently rested its decision in part on a conclusion that it was unfair for the lower court to reverse the KCC on this basis, given that the *KCC Order* was decided before the issuance of the FCC's *Universal Service Order*, and given the KCC's stated intention to modify the program in light of the FCC's order. *Id.* at 700; *see infra* at 13-14.

specifically *required* under Section 253(d), to engage in a *de novo* review of the federal Communications Act issues presented here. 41/ The KCC apparently agrees. 42/

The Commission must preempt the "revenue neutral" structure of the Kansas Fund because it violates Section 253(a) of the Act. In effect, the Fund amounts to a revenue shift from carriers other than incumbent LECs to subsidize the incumbent LECs. The incumbent LECs benefit significantly from the revenue neutrality guarantee of the Fund. Their intrastate access rate reduction is entirely offset, primarily with disbursements from the Fund -- for which competing carriers are ineligible in most of the state, as discussed above (and to a much lesser extent, with so-called "universal service" surcharges on their end user customers). By contrast, CMRS providers and other competitive local carriers are hit with a very substantial contribution requirement. This "significantly affects, if not completely eliminates," 43/ the ability of carriers other than incumbent LECs to provide service, and thus violates Section 253(a).

Moreover, the "revenue neutral" nature of the Kansas Fund is not consistent with Section 253(b)'s requirements because it is not "competitively neutral," is not "consistent with section 254," and is not "necessary to preserve and

41/ See *supra* note 5.

42/ "The KCC takes the position that . . . the FCC, not the courts, has jurisdiction over the matter of barriers to entry. . . ." *Kansas Supreme Court Decision*, 956 P.2d at 699.

43/ *New England Public Communications Council*, 11 FCC Rcd at 19722, ¶ 20.

advance universal service.” 44/ It is not “competitively neutral” because it singles out incumbent LECs for a beneficial revenue neutrality guarantee, while leaving other carriers decidedly worse off. Furthermore, it is neither “consistent with Section 254” nor “necessary to preserve and enhance universal service” in several respects. 45/

First, there is no reason to believe that the Fund has anything to do with ensuring that consumers in rural and high-cost areas have reasonably priced access to telecommunications services, as directed by Section 254(b)(3). The Fund provides a revenue assurance to incumbent LECs, not any universal service assurance to consumers. 46/

Second, contrary to Sections 254(b)(4) and (d), the Fund is not “equitable and nondiscriminatory” -- as described above, it discriminatorily favors

44/ 47 U.S.C. § 253(b).

45/ The KCC comes close to conceding this point. First, at the Kansas Supreme Court, it conceded that it ultimately will be “required to review the cost of providing local service and modify the KUSF accordingly.” *Kansas Supreme Court Decision*, 956 P.2d at 699. Moreover, it lamely argued that “if the KUSF had been called something else, such as the Transition Fund, no section of [Section 254 of] the Federal Act would have been applicable to the revenue neutral phase-down[.]” *Id.* The KCC overlooks the applicability of Section 253.

46/ “What is the cost of basic telephone service in Kansas? We have no answer from the record before us. What is the cost to provide universal service? We have no answer from the record before us. . . . The result is a final order that fully protects incumbent LECs by shifting lost revenues from one corporate pocket to another while requiring all other providers and consumers to bear the financial burden of ‘revenue neutral’ regulation. . . . [T]he KCC order has created a \$111.6 million fund that bears no rational relation to the concept of universal service and its cost.” *Kansas Appeals Court Decision*, 943 P.2d at 506-07.

the incumbent LECs and harms their competitors. Nor, under Sections 254(b)(4), (d), and (f), is it targeted to "preserve and advance universal service." The only interest it preserves and advances is the financial interest and earnings of incumbent LECs.

Third, the Kansas program does nothing to ensure, as required by Section 254(e), that the incumbent LECs, recipients of the Fund's largesse, "use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."

Fourth, while the Fund purports to be a state program authorized by Section 254(f), it is blatantly "inconsistent with the Commission's rules." Section 254(f) authorizes states to "provide for additional definitions and standards" -- but only if those definitions and standards "preserve and advance universal service," which, as discussed above, the Kansas Fund does not.

Fifth, the Fund has no discernible relationship to ensuring that "universal service is available at rates that are just, reasonable, and affordable" under Section 254(i). Neither the Kansas legislature nor the KCC made any findings regarding the affordable level of rates for supported universal service. Nor has either body done anything to ensure that noncompetitive services do not cross-subsidize competitive services, as required by Section 254(k). ^{47/} Indeed, the Kansas Fund exacerbates the problem by creating a new subsidy mechanism from

^{47/} "The funding methodology also precludes meaningful review of whether LECs are using services that are not competitive to subsidize services that are subject to competition." *Kansas Appeals Court Decision*, 943 P.2d at 507.

one class of carriers to another, rather than eliminating implicit subsidies and targeting new funding mechanisms to universal service support.

Finally, the Commission should exercise its preemption authority as the Act requires, notwithstanding the KCC's characterization of the current revenue neutral Fund structure as transitional and its assertion that, at some point in the future, it plans to replace it with a fund targeted to the cost of providing universal service. ^{48/} The Commission squarely rejected a very similar claim regarding a supposedly "transitional" program imposed by a Wyoming law, holding that "Section 253(a), however, does not exempt from its reach State-created barriers to entry that are scheduled to expire several years in the future." ^{49/}

In sum, the incumbent LEC revenue neutrality guarantee in the Kansas Fund effectively erects a barrier to entry by competitive carriers and thus violates Section 253(a). The Fund cannot be defended under Section 253(b) as a "competitively neutral" mechanism "necessary to preserve and advance universal service," and it violates Section 254 in multiple respects. Accordingly, the Commission is required, under Section 253(d), to preempt the program.

^{48/} *Kansas Supreme Court Decision*, 956 P.2d at 699; see also *Investigation into Southwestern Bell Tel. Co.'s Cost to Provide Local Service*, Docket No. 98-SWBT-677-GIT, Order No. 1: Opening Docket and Assessing Cost, ¶¶ 7-8 (KCC 1998) (available on the Internet at <http://www.kcc.state.ks.us/telecom>).

^{49/} *Silver Star Tel. Co.*, 12 FCC Rcd at 15657, ¶ 39. Cf. *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) (reversing and remanding a "revenue neutral" mechanism that the court held to be unjustified, even though the Commission supposedly adopted it only for an "interim" period).

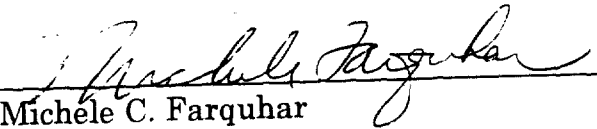
III. CONCLUSION

For the foregoing reasons, Western Wireless asks that the Commission, pursuant to Section 253 of the Communications Act, preempt the Kansas Fund's disbursement provisions and its revenue neutral structure.

Respectfully submitted,

WESTERN WIRELESS CORPORATION

Gene DeJordy
Executive Director of
Regulatory Affairs
WESTERN WIRELESS CORP.
3650 - 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

By: 
Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5600

Mark P. Johnson
Lisa C. Creighton
Amy E. Bauman
SONNENSCHN, NATH & ROSENTHAL
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
(816) 932-4400

Counsel for Western Wireless Corporation

Dated: July 20, 1998

CC: 96-45

A

KS ST s 66-2001
K.S.A. § 66-2001

KANSAS STATUTES ANNOTATED
CHAPTER 66. PUBLIC UTILITIES
ARTICLE 20. TELECOMMUNICATIONS

COPR. © 1997 By Revisor of Statutes of Kansas

Current through End of 1997 Reg. Sess.

66-2001. Telecommunications; declaration of public policy.

It is hereby declared to be the public policy of the state to:

(a) Ensure that every Kansan will have access to a first class telecommunications infrastructure that provides excellent services at an affordable price;

(b) ensure that consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates;

(c) promote consumer access to a full range of telecommunications services, including advanced telecommunications services that are comparable in urban and rural areas throughout the state;

(d) advance the development of a statewide telecommunications infrastructure that is capable of supporting applications, such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to internet providers and others; and

(e) protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience and necessity.

History: L. 1996, ch. 268, § 1; July 1.

<General Materials (GM) - References, Annotations, or Tables>

CROSS REFERENCES TO RELATED SECTIONS:

1997 Pocket Part Cross References to Related Sections:

Applicable definitions, see 66-1,187.

K. S. A. § 66-2001

KS ST § 66-2001

KS ST s 66-2002
K.S.A. § 66-2002

KANSAS STATUTES ANNOTATED
CHAPTER 66. PUBLIC UTILITIES
ARTICLE 20. TELECOMMUNICATIONS

COPR. © 1997 By Revisor of Statutes of Kansas

Current through End of 1997 Reg. Sess.

66-2002. Duties of the corporation commission.

The commission shall:

(a) Adopt a definition of "universal service" and "enhanced universal service," pursuant to subsections (p) and (q) of K.S.A. 1997 Supp. 66-1,187;

(b) authorize any requesting telecommunications carrier to provide local exchange or exchange access service pursuant to subsection (a) of K.S.A. 1997 Supp. 66-2003;

(c) on or before July 1, 1996, the commission shall initiate a proceeding to adopt guidelines to ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers;

(d) review, approve and ensure compliance with network infrastructure plans submitted by local exchange carriers pursuant to K.S.A. 1997 Supp. 66-2005;

(e) review, approve and ensure compliance with regulatory plans submitted by local exchange carriers pursuant to K.S.A. 1997 Supp. 66-2005;

(f) on or before January 1, 1997, establish, pursuant to K.S.A. 1997 Supp. 66-2006, the Kansas lifeline service program, hereinafter referred to as the KLSP;

(g) initiate and complete a proceeding by January 1, 1997, to establish a competitively neutral mechanism or mechanisms to fund: dual party relay services for Kansans who are speech or hearing impaired; telecommunications equipment for persons with visual impediments; and telecommunications equipment for persons with other special needs. This funding mechanism or mechanisms shall be implemented by March 1, 1997;

(h) on or before January 1, 1997, establish the Kansas universal service fund pursuant to K.S.A. 1997 Supp. 66-2008, hereinafter referred to as the KUSF, and make various determinations relating to the implementation of such fund;

(i) authorize all local exchange carriers to provide internet access as outlined in K.S.A. 1997 Supp. 66-2011 and report on the status of the implementation provisions to specified legislative committees;

(j) review the federal act and adopt additional standards and guidelines as necessary for enforcing slamming restrictions;

(k) commencing on June 1, 1997 and periodically thereafter, review and, to the extent necessary, modify the definition of universal service and enhanced universal service, and KUSF, taking into account advances in telecommunications and information technology and services;

(l) on or before January 1, 1997, initiate and complete a proceeding to establish minimum quality of service standards which will be equally applicable to all local exchange carriers and telecommunications carriers in the state; any local exchange carrier or telecommunications carrier violating such standards, for each occurrence, shall forfeit and pay a penalty of not less than \$100, nor more than \$5,000; violations of such standards shall be enforced in accordance with provisions of K.S.A. 66-138 and 66-177, and amendments thereto; and

(m) on January 1, 2000, prepare and submit a report to the legislature. The report shall include an analysis of the manner in which the regulatory framework has served to: Protect consumers; safeguard universal service; ensure that consumers have reaped the benefits of competition; maximize the use of market forces; and promote development of the telecommunications infrastructure throughout the state. The commission also shall recommend if and how the KUSF should be modified.

History: L. 1996, ch. 268, § 3; July 1.

<General Materials (GM) - References, Annotations, or Tables>

K. S. A. § 66-2002

KS ST § 66-2002